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No. 01-1862

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

ROBERT FREDERICK GARCEAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the correct triggering event for application of AEDPA to capital cases?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state court based on arguments fully considered and fairly resolved there, well within the limits in which reasonable, conscientious judges can differ. By a tenuous

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

extrapolation of this Court's decisions, the Ninth Circuit continues to substitute its own, often erroneous, judgment for such decisions over six years after Congress ordered a halt to this practice. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 6 or 7, 1984, Robert Garceau stabbed to death his girlfriend, Maureen Bautista, in the presence of her 14-year-old son, Telesforo, in an apartment in Bakersfield, California. *People* v. *Garceau*, 6 Cal. 4th 140, 156, 862 P. 2d 664, 670 (1993). Garceau next murdered Telesforo. Two of Garceau's acquaintances, Greg Rambo and Larry Tom Whittington, concealed the bodies inside a bedroom dresser and transported the dresser to Rambo's residence in Shandon, California, where it was buried in Rambo's back yard under a layer of fresh concrete. *Id.*, at 156, 862 P. 2d, at 670-671. Five months after the murders and burial, Garceau murdered Greg Rambo. Prior to the trial in this case, he was convicted of murdering Rambo and sentenced to 33 years to life. *Id.*, at 156, n. 2, 862 P. 2d, at 671, n. 2.

The prosecution's case relied primarily upon Garceau's confessions to several people with whom he worked in the methamphetamine manufacturing business. See *id.*, at 157, 862 P. 2d, at 671. He killed Maureen Bautista because he feared that she would "snitch," and he killed her son because he had witnessed the murder of his mother. *Ibid.* Numerous witnesses testified to Garceau's intense hatred of snitches, including comments that they deserved to die. *Ibid.*

The defense primarily tried to undermine the credibility of the witnesses to Garceau's confessions. See *id.*, at 156, 862 P. 2d, at 671. A large part of this defense was the witnesses' "odd behavior, complicity, and deception in the aftermath of Greg Rambo's murder." *Id.*, at 163, 862 P. 2d, at 675. Therefore, the defense introduced evidence of the Rambo murder during its cross-examination of the prosecution's witnesses. The trial court instructed the jury that it could consider evidence of Garceau's other crimes " 'for any purpose, including . . . [his] character . . . .' " See *id.*, at 186, 862 P. 2d, at 690 (emphasis omitted).

The jury convicted Garceau on two counts of first-degree murder and found the special circumstance of multiple murder. *Id.*, at 155-156, 862 P. 2d, at 670. He was sentenced to death at the penalty phase. See *id.*, at 156, 862 P. 2d, at 670. The California Supreme Court unanimously affirmed the conviction and sentence. It held that the "other crimes" instruction was error under the state evidence code, but that even if this also violated due process, the error was harmless beyond a reasonable doubt. See *id.*, at 186-187, 862 P. 2d, at 692. The court also rejected Garceau's habeas petition on the merits. See *Garceau* v. *Woodford*, 275 F. 3d 769, 771 (CA9 2001). Garceau requested a stay of execution and appointment of counsel to pursue federal habeas corpus in federal district court on May 12, 1995. Counsel was appointed on June 26, 1995, and the habeas petition was filed over a year later, on July 2, 1996, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *id.*, at 772, and n. 1.

The district court denied the habeas petition and declined to issue a certificate of probable cause. A divided panel of the Ninth Circuit reversed, holding that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not apply because under Ninth Circuit precedent the petition was "pending" as of the date that Garceau requested counsel. See *ibid.*, n. 1. It also held that the prior crimes instruction violated due process and that the error was not harmless. See *id.*, at 777. The Ninth Circuit denied rehearing en banc, see *Garceau* v. *Woodford*, 281 F. 3d 919 (CA9 2002), and this Court granted certiorari on October 1, 2002.

SUMMARY OF ARGUMENT

The present case is exactly the kind of case in which Congress decided not to allow the final judgment of a state court to be overturned in collateral proceedings. The California Supreme Court carefully considered the merits, applied the correct law, and reached an entirely reasonable and probably correct result. Yet the Ninth Circuit substituted its own, probably erroneous judgment six years after Congress's decision.

Under the general rules for commencement of actions, a habeas corpus proceeding commences and becomes pending when the petition is filed. Until there has been a statement of the claims and a demand for relief, the habeas case as such is not pending.

McFarland v. *Scott* and *Hohn* v. *United States* do not require the contrary result. *Slack* v. *McDaniel* recognized that a habeas case is not an indivisible whole. Just as an appellate case can be different from the district court case for the purpose of applicability of AEDPA, so can the habeas case proper be different from preliminary proceedings for appointment of counsel and stay.

Although it is not necessary to modify *McFarland* to find AEDPA applicable to this case, adoption of Justice O'Connor's position in that case would simplify the law. In that interpretation, a district court can appoint a lawyer to represent an inmate before a petition has been filed, but the case does not begin and a stay cannot issue until the petition is filed. Although Congress did not directly abrogate *McFarland* in AEDPA, the wording of the statute in several places indicates Congress's understanding that a habeas case commences with the petition.

ARGUMENT

I. The present case is precisely the kind of decision Congress intended to prevent by enacting AEDPA.

AEDPA was designed to prevent decisions such as the one in this case. The Ninth Circuit's holding centers on an error of state law, the instruction that the defendant's other crimes could be considered by the jury for any purpose. A state-law evidence error does not transform a jury instruction into a due process violation. "To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore* v. *Taylor*, 508 U. S. 333, 342 (1993). Whether state evidence law was violated "is no part of a federal court's habeas review of a state conviction." *Estelle* v. *McGuire*, 502 U. S. 62, 67 (1991). Due process is not a detailed code of procedure. See *Medina* v. *California*, 505 U. S. 437, 444 (1992). Even the admission of irrelevant evidence does not violate due process. See *Romano* v. *Oklahoma*, 512 U. S. 1, 10 (1994). Much more is necessary before due process is violated.

In *McGuire*, this Court declined to address whether allowing prior crimes evidence to prove a propensity to commit the charged offense violated due process. See 502 U. S., at 75, n. 5. In light of *McGuire* and its progeny, the case for a due process violation is unclear at best. See *People* v. *Garceau*, 6 Cal. 4th 140, 211, 862 P. 2d 664, 708 (1993) (Kennard, J., concurring). Since propensity evidence, even when improperly admitted, is relevant to guilt, see, *e.g.*, *Michelson* v. *United States*, 335 U. S. 469, 476 (1948); 1 J. Wigmore, Evidence § 58.1, p. 1211 (Tillers rev. 1983), the case for a due process violation from its improper admission evaporates. At worst, the prior crimes evidence poses an excessive risk of prejudicing the defendant in light of its probative value with respect to guilt. Due process violations require much more, as this Court has " 'defined the category of infractions that violate "fundamental fairness" very

narrowly.'" *McGuire*, *supra*, at 73 (quoting *Dowling* v. *United States*, 493 U. S. 342, 352 (1990)).

In *Spencer* v. *Texas*, 385 U. S. 554, 563 (1967), this Court held that other crimes evidence did not violate due process in a case where the jury was instructed not to consider it as evidence of guilt on the current charge. The Ninth Circuit relied on *Spencer* and two circuit court decisions predating *McGuire* to hold that prior crimes evidence without a limiting instruction like *Spencer*'s violates due process. See *Garceau* v. *Woodford*, 275 F. 3d 769, 774 (CA9 2001). After *McGuire*, these cases do not even support the Ninth Circuit's holding, let alone compel it. The opinion below is no more than a disagreement with a unanimous California Supreme Court over the scope of due process, with California's high court getting the better of the argument.

Even if there could be a due process violation, the error is harmless. Justice Mosk's concurrence points out that Garceau's numerous corroborated confessions eliminate any unconstitutional prejudice from the prior crimes evidence. He contrasts this case with the "general case" in which such use is prejudicial.

> "This, however, is *not* the general case. On several occasions and to several persons, defendant confessed that he committed the charged murders. By evidence both physical and testimonial, his confessions were corroborated.
>
> "It has been stated that a confession may have an 'indelible impact' on the jury, inducing it 'to rest its decision on that evidence alone, without . . . consideration of' the rest. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 313 [113 L.Ed.2d 302, 333, 111 S.Ct. 1246, 1266] (conc. opn. of Kennedy, J.).)
>
> "If even a single confession may have such an 'indelible impact,' several confessions—as in this case—must practically compel the jury to return a guilty verdict no matter what the other evidence says or does not say." *People* v. *Garceau*, 6 Cal. 4th, at 210, 862 P. 2d, at 707 (Mosk, J., concurring) (emphasis in original).

Eleven judges have addressed this claim, and nine have rejected it. See 275 F. 3d, at 771 (claim denied by District Court); *id.*, at 781 (O'Scannlain, J., dissenting). When it adopted AEDPA, Congress rejected the premise that the federal court of appeals' answer to a legal question was necessarily better than the state supreme court's answer. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch).

On questions of law resolved on the merits in state court, Congress limited the lower federal courts to correcting judgments that were "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. § 2254(d)(1). There is no clearly established law in this Court's precedents creating a federal constitutional rule against propensity evidence. *McGuire*, 502 U. S., at 75, n. 5, expressly reserved the question. A decision raising a rule of evidence to constitutional status is a "new rule," see *Sawyer* v. *Smith*, 497 U. S. 227, 239 (1990), and a rule which is "new" for the purpose of retroactivity is necessarily not "clearly established" for the purpose of § 2254(d)(1). See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Because there is no clearly established rule, the decision of the California Supreme Court cannot be contrary to or an unreasonable application of a nonexistent rule, and if AEDPA applies to this case, this claim must certainly be denied.

Landgraf v. *USI Film Products*, 511 U. S. 244, 259 (1994) noted, "Purely prospective application [of a statute] . . . would prolong the life of a remedial scheme . . . that Congress obviously found wanting." The Ninth Circuit has prolonged the life of the rejected pre-AEDPA remedial scheme to a preposterous duration. It continues to substitute its own judgment for the careful, considered, reasonable decisions of the California Supreme Court *six years* after Congress ordered it to cease and desist. See *Woodford* v. *Visciotti*, 537 U. S. __ (No. 02-137,

Nov. 4, 2002) (slip op., at 5) ("§ 2254(d)'s 'highly deferential standard' . . . demands that state court decisions be given the benefit of the doubt"). The central purpose of the reform, after all, was to curb delays. *Williams*, 529 U. S., at 404. By no stretch of the imagination could it be thought that Congress intended that its anti-delay legislation be delayed this long. The most basic respect for the legislative process requires that Congress's reforms be applied to this case.

II. A proceeding is "pending" for the purpose of *Lindh* v. *Murphy* when the petition is filed and not before.

"In *Lindh* v. *Murphy*, 521 U. S. 320 (1997), the Court held that AEDPA's amendments to 28 U. S. C. § 2254, the statute governing entitlement to habeas relief in the district court, applied to cases *filed* after AEDPA's effective date. 521 U. S., at 327." *Slack* v. *McDaniel*, 529 U. S. 473, 481 (2000) (emphasis added). The *Lindh* and *Slack* Courts understood "filed" to refer to "the date a *petition* was filed in the district court." *Id.*, at 482 (emphasis added). This was understood to be the date on which a habeas case became "pending," a term *Lindh* uses interchangeably with "filed." See, *e.g.*, 521 U. S., at 323.

In general, a case is commenced and becomes pending when the moving party files a document which identifies the claims made and specifies the relief requested. Authority on this point is somewhat sparse, apparently because it has long been nearly universally understood that filing a complaint or equivalent document marks the commencement of a case.

In re Connaway, 178 U. S. 421 (1900) is one of the few decisions of this Court on when an action begins so as to make it "pending."[2] Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire*

2. *McFarland* v. *Scott*, 512 U. S. 849 (1994) is discussed in part III, *infra*.

facias to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death because he had not been served. Connaway applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced*, and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[3] By section 405 of the Code of Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' By section 406 summons may be issued at any time within a year, and if necessary to different counties. The defendant may appear, however, at any time within a year. *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the

3. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 1 J. Moore, Moore's Federal Practice § 1App.100, at 1App-4 (3d ed. 2002).

Federal Rules of Civil Procedure ("FRCP") is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court." *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 533 (1949) held that a suit was commenced under Rule 3 upon the filing of the complaint, although in that diversity case a different state rule governed for the purpose of the state statute of limitations.

The "complaint" in habeas corpus is the petition. Compare Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") ("specify all the grounds of relief . . .") with FRCP 8(a)(2) ("a short and plain statement of the claim . . ."). There are procedures in habeas corpus to dispose of insubstantial petitions. Habeas Rule 4 provides for prompt examination of the petition by the district judge and summary dismissal if it is meritless on its face. Under Habeas Rule 5, the respondent can answer the petition, and the answer " 'may demonstrate that the petitioner's claim is wholly without merit.' " Advisory Committee's Note on Habeas Rule 5 (quoting Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1083, 1178 (1970)). In that event, the petition can be denied without an evidentiary hearing. See Habeas Rule 8(a).

None of the procedures for "disposition of the petition," see *ibid.*, can be invoked until there is a petition. Until a claim of illegal detention and a demand for release (whether conditional or unconditional) have been stated, the essence of a habeas case is missing, *i.e.*, "a proceeding seeking relief for . . . wrongful detention in violation of the Constitution." *Hohn* v. *United States*, 524 U. S. 236, 241 (1998).

Baldwin County Welcome Center v. *Brown*, 466 U. S. 147 (1984) (*per curiam*), illustrates the minimum requirements to commence a case. In *Baldwin County*, would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission

(EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

The District Court held that Brown had forfeited her right to judicial review by failing to file a complaint within the statutory time. Specifically, the court rejected the contention that the copy of the right-to-sue letter could be deemed a complaint. *Id.*, at 148-149. The Court of Appeals reversed on the theory that filing the letter "tolled" the statute. *Id.*, at 149. The Supreme Court reversed. *Ibid.*

First, this Court approved the District Court's ruling that the EEOC letter could not be deemed a complaint. This Court noted that under FRCP 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule." *Id.*, at 149. Upholding this ruling, this Court rejected the Court of Appeals' notion that civil rights plaintiffs were somehow exempt because of a special solicitude for this class of plaintiffs. *Id.*, at 149-150.

The complaint later filed, this Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon

> which it rests.' [Citation.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id.*, at 150, n. 3 (emphasis added).

Baldwin holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading which commences a case. A mere application for counsel, or request for a stay, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by FRCP 8 but rather by 28 U. S. C. § 2241 and Habeas Rule 2. That rule establishes the requirements to commence a habeas case. It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. FRCP 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury. See Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid.* The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 163-164 (1990).

In addition, Habeas Rule 2(c) retains "fact pleading" rather than the FRCP 8 "notice pleading." Advisory Committee's Note on Habeas Rule 4. Even the partisan Professor Liebman, who calls this requirement "anomalous," 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 11.6, p.

573, n. 3 (4th ed. 2001), grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings." *Ibid.* The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id.*, at 62 (White, J., concurring).

In summary, there is an irreducible minimum below which a paper cannot commence a habeas case. It must serve the basic functions of identifying the claims and their factual basis and of specifying the relief requested. The first pleading that performs these functions is the petition.

III. A request for counsel and stay is a "distinct step" from the actual attack on the judgment, and the two are considered separately under the rule of *Slack* v. *McDaniel*.

In *Calderon* v. *United States District Court* (*Kelly*), 163 F. 3d 530 (CA9 1998) (en banc), the Ninth Circuit held that the inmate's filing of a request for counsel and stay was sufficient to make a habeas case "pending" for the purpose of determining whether AEDPA applies. See *id.*, at 540. The Ninth Circuit overruled its precedent to the contrary, *Calderon* v. *United States District Court* (*Beeler*), 128 F. 3d 1283, 1287, n. 3 (CA9 1997), because it believed that *Hohn* v. *United States*, 524 U. S. 236 (1998) required this result. See *Kelly*, 163 F. 3d, at 540.

All of the other circuits to address this issue have reached the opposite conclusion. See *Isaacs* v. *Head*, 300 F. 3d 1232, 1239 (CA11 2002); *Moore* v. *Gibson*, 195 F. 3d 1152 (CA10 1999); *Williams* v. *Coyle*, 167 F. 3d 1036, 1038 (CA6 1999); *Gosier* v. *Welborn*, 175 F. 3d 504, 506 (CA7 1999); *Williams* v. *Cain*, 125 F. 3d 269, 274 (CA5 1997).

A few years before *Lindh* v. *Murphy*, 521 U. S. 320 (1997) and the enactment of AEDPA, this Court decided *McFarland* v. *Scott*, 512 U. S. 849 (1994) regarding whether a district court had jurisdiction to appoint counsel and stay an execution before a habeas petition was filed. Under 21 U. S. C. § 848(q)(4)(B), a capital defendant in a post-conviction proceeding under 28 U. S. C. § 2254 or § 2255 has a statutory right to qualified legal representation. Under 28 U. S. C. § 2251, a federal judge before whom a habeas proceeding is pending has the power to stay any related state court proceeding. The lower courts in *McFarland* refused to appoint counsel for the defendant, because, at the time he filed his motion, he had yet to file his habeas petition. 512 U. S., at 853. This Court reversed, finding that under § 848(q)(4)(B) a capital defendant has a right to legal assistance in the preparation of a habeas application and that a post-conviction proceeding within the meaning of the statute is commenced when a capital defendant files a motion for appointment of counsel. *Id.*, at 856-857. Only after addressing that issue did this Court address whether a federal court has jurisdiction to stay a related state court proceeding under § 2251. This Court read the two statutes together and found that they use the terms "post conviction proceeding" and "habeas corpus proceeding" interchangeably, and that to effectuate a capital defendant's right to counsel, once a capital defendant invokes that right, a federal court has jurisdiction to enter a stay of execution even before he files a formal habeas petition. *Id.*, at 858.

McFarland is a decision driven by practical necessities, both real and perceived. The need to appoint counsel prior to the filing of the petition is quite real. *McFarland* notes the heightened pleading requirements and the procedures for summary dismissal. 512 U. S., at 856. Undoubtedly, "Congress . . . did not intend for the express requirement of counsel to be defeated" by the summary dismissal of a *pro se* petition. *Ibid.* *McFarland*'s stretch of when a proceeding was pending so as to authorize a stay was further driven by the conviction that the statutory right to counsel would be "meaningless"

unless that power existed before the filing of the petition. See *id.*, at 857. The validity of this premise is discussed in part IV, *infra*, but for now it is sufficient to recognize it as the driving force behind the decision. Where the reason for a rule ends, the rule should end. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). The dire consequences the *McFarland* Court feared are completely absent here, and its strained interpretation of § 2251 should be stretched no further.

Several years after *McFarland*, this Court decided *Hohn* v. *United States*, 524 U. S. 236 (1998). *Hohn* held that under AEDPA, a denial of an application for a certificate of appealability (COA) constitutes a "case" in the Court of Appeals which this Court has jurisdiction to review. *Id.*, at 239. This Court also rejected an argument that an application for a COA is a threshold matter separate from the merits which, if denied, prevents this Court from asserting jurisdiction over the matter. *Id.*, at 246. Focusing on the latter pronouncement, the Ninth Circuit interpreted *Hohn* to mean that pretrial motions for appointment of counsel and a stay of execution under *McFarland* are threshold matters constituting a "case" in the district court, thereby commencing a habeas proceeding. *Kelly*, 163 F. 3d, at 540. This interpretation extrapolates *McFarland* and *Hohn* too far. See *Williams* v. *Coyle*, 167 F. 3d, at 1040.

Neither *McFarland* nor *Hohn* directly address the issue presented in this case of when a habeas proceeding is commenced for the purpose of determining the applicable law. Rather, the holdings of those cases simply relate to jurisdiction. Essentially, under *McFarland*, a court has jurisdiction to enter a stay of execution once a motion for appointment of counsel is filed, and under *Hohn*, this Court has jurisdiction to review a denial of an application for a COA. In *Kelly*, the Ninth Circuit stretched the holdings of those two cases a step further to find that when a capital defendant files a pretrial motion for appointment of counsel, that commences a habeas proceeding so that a case is "pending," thereby rendering a subsequent act of Congress inapplicable. According to the Ninth Circuit, because

a case is "pending" when a motion of appointment of counsel is filed, AEDPA is not applicable even if the actual habeas petition, which is the only method of attacking the judgment against the capital defendant, is filed *after* AEDPA's effective date.

While *Kelly*'s extrapolation of *McFarland* and *Hohn* may have seemed plausible at the time, it is no longer so after *Slack* v. *McDaniel*, 529 U. S. 473 (2000). The issue in *Slack*, which is strongly analogous to the issue in this case, was whether pre- or post-AEDPA rules applied to an appeal filed pursuant to 28 U. S. C. § 2253 after AEDPA's effective date in a case where the defendant's original habeas petition was filed in the district court before AEDPA's effective date. This Court held that *post*-AEDPA rules apply to jurisdiction to hear appeals in these circumstances. 529 U. S., at 481-482.

Slack argued that under *Lindh*, post-AEDPA rules relating to applications for a COA did not apply to him because his habeas petition was filed in the district court before AEDPA became effective. *Id.*, at 481. The *Slack* Court recognized that in *Hohn*, this Court also applied post-AEDPA law to Hohn's appeal even though Hohn's original habeas petition was filed before the Act's effective date, implicitly rejecting Hohn's argument to the contrary. See *Slack*, 529 U. S., at 482 (citing Brief for Petitioner in *Hohn* v. *United States*, O. T. 1997, No. 96-8986, pp. 40-44). *Slack* made explicit what was implicit in *Hohn*:

> "*While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. Hohn* v. *United States*, 524 U. S. 236, 241 (1998); *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U. S. 131 (1924). . . . *Under AEDPA, an appellate case is commenced when the application for a COA is filed. Hohn, supra*, at 241. When Congress instructs us (as *Lindh* says it has) that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court. Thus, § 2253(c) governs

> appellate court proceedings filed after AEDPA's effective date." *Slack*, 529 U. S., at 481-482 (emphasis added).

Slack recognized that it is not necessary to view all proceedings relating to a habeas petition as an inseparable whole. Rather, those proceedings are divisible for purposes of the effective date of AEDPA. In the context of this case, *Slack* indicates that although filing pretrial motions for appointment of counsel and a stay of execution may initiate a "proceeding" of some kind, the actual filing of the habeas petition, like the actual filing of the application for a COA, is a "distinct step."

Slack also recognized that a court must consider the relevant case before it in order to determine the applicable law. Here, the statute that provides state prisoners with the right to collaterally attack criminal judgments via the writ of habeas corpus is 28 U. S. C. § 2254. Thus, only when a state prisoner files an application for a writ of habeas corpus in federal court is § 2254 triggered. See 28 U. S. C. § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an *application* for a writ of habeas corpus . . ." (emphasis added)); see also 28 U. S. C. § 2254(e)(1) ("In a proceeding *instituted by an application for a writ of habeas corpus* . . ." (emphasis added)); 28 U. S. C. § 2242 (written application, statement of facts required); Habeas Rule 2 (petition requirements). *Slack* ties the applicability of each statute to the date the petitioner sought relief under that statute. The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal. "Because Slack sought appellate review two years after AEDPA's effective date, [amended] § 2253(c) governs his right to appeal." 529 U. S., at 482. In exactly the same way, new § 2254(d) establishes a new prerequisite for a collateral attack on a state conviction. It should govern any case where the petitioner first asked the federal court to overturn that judgment after AEDPA's effective date.

This Court's recent opinion in *Carey v. Saffold*, 536 U. S. __, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002) when contrasted

with *Hohn* and *Slack*, illustrates that what constitutes a single case in one context does not necessarily constitute a single case in another context. In *Carey*, this Court found that an application for state collateral review is "pending," as that term is used in 28 U. S. C. § 2244(d)(2), from the time between the initial filing in the trial court on a state habeas petition and the disposition by the highest state court, including the periods of time in the middle in which no court was actually considering the case. *Id.*, 153 L. Ed. 2d, at 268, 122 S. Ct., at 2138. That was true even with respect to California's unique system of filing a separate, original state habeas petition at each step of the state collateral review process.

In *Hohn* and *Slack*, on the other hand, this Court recognized a distinction between a federal habeas case at the trial court level and a federal habeas case at the appellate court level. In that situation, this Court has found that a federal habeas case is not a single case from beginning to end. Rather, the proceeding is divisible for purposes of what law to apply. Like *Hohn* and *Slack*, not only is there a divisible point between the habeas petition filed at the trial court level and an application for a COA filed at the appellate court level, but there is a similar divisible point between the time of pre-petition motions and the filing of the actual habeas petition. By filing a federal habeas petition, a capital defendant has then, and only then, taken the relevant step of commencing the process of collateral attack on the judgment.

Even before *Slack*, the Ninth Circuit was alone in its conclusion that a habeas case is "pending" for the present purpose from the point pretrial motions for appointment of counsel and a stay of execution are filed. The other circuits which have addressed this issue had all reached the opposite conclusion. See *supra*, at 13. After *Slack*, the Eleventh Circuit joined the others. See *Isaacs* v. *Head*, 300 F. 3d 1232, 1242 (CA11 2002). The court in *Isaacs* found that neither *McFarland* nor *Hohn* directed the result advanced by the defendant, which was that reached by the Ninth Circuit. *Id.*, at 1239.

Isaacs found that *McFarland* was only concerned with interpreting and giving effect to two narrow statutory provisions, and finding that a habeas case is pending from the moment pretrial motions are filed would be a stretch at best. *Id.*, at 1245. The court also found that *Hohn* was limited to the narrow question of jurisdiction. *Ibid.* Thus, the *Isaacs* court found that although filing a pretrial motion for appointment of counsel may initiate a "case," it does not commence a habeas proceeding under § 2254. *Ibid.* Instead the court looked to *Slack* to find a dividing line between filing pretrial motions and filing a habeas petition. In doing so, the court stated,

> "A motion for appointment of counsel has no relation to the merits of a habeas petition and does not seek any form of merits relief from a district court. Such a motion does not even assure that a habeas case will ever materialize. . . . Furthermore, the Supreme Court's opinion in *Slack* supports the idea that all proceedings that have any relation to a habeas petition do not have to be viewed as a unified whole for purposes of AEDPA. Instead, *Slack* expressly recognized that a court, in order to determine the applicable law, must determine what is 'the relevant case.' *Slack*, [529 U. S.,] at 482, 120 S. Ct., at 1603. We believe that it follows—from the Supreme Court's recognition that an appellate case may be subject to AEDPA even though the underlying district court proceedings were not—that even though a motion for appointment of counsel was filed before AEDPA and was not subject to its provisions, a later filed habeas petition may nonetheless be governed by the stricter AEDPA standards that took effect in the interim." 300 F. 3d, at 1245-1246.

The other circuits reached the same conclusion as the Eleventh Circuit purely by distinguishing *McFarland* and *Hohn*. The addition of *Slack* to the analysis makes the conclusion reached by the majority of the circuits even stronger, refuting the notion that *McFarland* is controlling.

Further strengthening the proposition that pretrial motions relating to a habeas petition are divisible from the habeas case itself are *United States* v. *Mine Workers*, 330 U. S. 258 (1947) and *United States* v. *Shipp*, 203 U. S. 563 (1906). In those cases, this Court held that until a court announces its judgment regarding whether it has jurisdiction over the merits of the case, it has the authority to grant a stay to preserve the status quo. The parties must comply with that order or they risk being held in contempt of court. *Mine Workers*, *supra*, at 293; *Shipp*, *supra*, at 573. The defendants in those cases had contended that if the court lacked jurisdiction over the underlying action, it also lacked jurisdiction to grant preliminary injunctive relief. The injunctions were therefore void, the argument went, and could be disregarded with impunity. See *Mine Workers*, *supra*, at 290; *Shipp*, *supra*, at 572. The Court rejected the argument in both cases.

The rule of *Mine Workers* and *Shipp* advances the premise that distinct portions of a proceeding are divisible for purposes of what law is applicable. In those cases, the parties were required to comply with a separate preliminary stay order of the court until informed otherwise. The question of whether the court had jurisdiction to review the underlying proceeding is distinct from the law applicable to the preliminary order. It thus follows that a preliminary order and a decision on the merits are distinct. If a court can have jurisdiction over one and not the other, then they need not be "pending" at the same time.

In short, *Slack* establishes that *McFarland* and *Hohn* are not controlling of the present question. The commencement of a habeas case should be governed by the same rules that govern the commencement of any other case. For the reasons stated in part II, *supra*, the commencement is the filing of the habeas petition, and not any pre-filing event.

IV. An alternative resolution would be to adopt Justice O'Connor's position in *McFarland*.

As discussed in part III, *supra*, the holding in *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994) regarding prefiling stay jurisdiction is not necessarily inconsistent with the understanding expressed in *Slack* v. *McDaniel*, 529 U. S. 473 (2000), that the applicability of amended 28 U. S. C. § 2254 depends on the date of filing of the habeas corpus petition. See *id.*, at 478, 481. However, a cleaner, simpler, and more consistent definition of when a case is pending could be formed by adopting Justice O'Connor's position in *McFarland*. Under this view, a single definition of commencement and pending would apply to both § 2251 and § 2254, to both capital and noncapital habeas, and to habeas consistently with civil cases. See, *e.g.*, *In re GTE Service Corp.*, 762 F. 2d 1024, 1026 (D.C. Cir. 1985) (no stay of agency order before petition for review, no petition pending). At the same time, the legitimate needs of capital habeas litigation would be met.

The statutory right to appointment of capital habeas counsel in 21 U. S. C. § 848(q)(4)(B) can easily be extended to prefiling assistance without doing violence to the definition of when a case is commenced. The words "commenced" and "pending" do not occur in this statute. It provides, "In any post conviction proceeding under section 2254 . . . [in a capital case], any [indigent] defendant . . . shall be entitled to the appointment of one or more attorneys . . . ." No great stretch is required to say that an attorney for the moving party is representing the party "in" a proceeding while drafting the pleading that initiates that proceeding. A civil plaintiff would say he has hired a lawyer to represent him *in* his lawsuit from the moment the representation agreement is made, not just after the complaint is filed. Construing representation in a proceeding to include precommencement representation does less violence to the statutory language than altering long-established understandings of when a proceeding commences, and it achieves the same practical result.

The same is not true of the stay power, however. On its face, § 2251 applies only when a "habeas corpus proceeding is pending . . . ." Construing this statute to authorize prefiling stays is inconsistent with the fact that Congress uses different language to expressly grant such authority when it considers it necessary. See *McFarland*, 512 U. S., at 861 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing 28 U. S. C. § 2101(f)); see also 28 U. S. C. § 2262(a)).

Nor is there a genuine practical necessity for a prefiling stay. Given a right to prefiling counsel, "prisoners can avoid the need for a stay by filing a prompt request for appointment of counsel well in advance of the scheduled execution." *Id.*, at 863.

Even if counsel is not appointed until shortly before a scheduled execution date, filing a federal habeas petition does not take long. Every defendant has a constitutional right to counsel on direct appeal, see *Douglas* v. *California*, 372 U. S. 353, 357 (1963). Although not constitutionally required to do so, see *Murray* v. *Giarratano*, 492 U. S. 1, 3-4 (1989), every state except Georgia now provides counsel on state postconviction review in capital cases. See Appendix A. With an appellate brief and a postconviction petition both prepared by counsel, it is no great difficulty to extract the federal claims and put them in the form of a § 2254 petition.

When the initial petition has been prepared in haste due to an impending execution, the district court can and should allow an amendment within a month or two to add any additional claims unknown or overlooked at first. Petitioner can amend as of right before the answer. See 28 U. S. C. § 2242 (civil rules apply to amendments); Fed. Rule Civ. Proc. 15(a). After the answer, "leave shall be freely given when justice so requires," Rule 15(a), which it surely does for a reasonably prompt amendment to an emergency petition. Even in Georgia, where there may not have been a counsel-prepared state post-conviction petition, the amendment rule can be applied generously enough to make up for this deficiency in any case where an

impending execution really does give counsel only a few days to prepare the petition.[4]

McFarland "by no means grants capital defendants a right to an automatic stay of execution." 512 U. S., at 858. An attorney who can state a case sufficient to warrant a stay, see *id.*, at 860-861 (opinion of O'Connor, J.), can also draft a petition sufficient to preclude immediate dismissal, and then amend it in a month or two.

It is true, of course, that *stare decisis* is a particularly weighty consideration in matters of statutory interpretation where there has not been " 'any intimation of Congressional dissatisfaction . . . .' " *Ankenbrandt* v. *Richards*, 504 U. S. 689, 700 (1992). This case, however, does not fit neatly into that category. While Congress has not abrogated the stay portion of *McFarland*, it has indicated a contrary view of when a habeas corpus proceeding commences.

Legislating specifically on the issue of pre-filing stays in Chapter 154, Congress provided that an execution ". . . shall be stayed upon application to any court that *would have* jurisdiction over any proceedings filed under section 2254." 28 U. S. C. § 2262(a) (emphasis added). The words "would have" are significant and cannot be ignored. The subsection is carried forward without substantial change from the Powell Committee's pre-*McFarland* proposal. See 135 Cong. Rec. 24,693, col. 3 (1989).

If Congress accepted the notion that an application for a stay is sufficient to commence a § 2254 proceeding, the words "would have" would not be there. Congress understood, as the Powell Committee understood, that a § 2254 proceeding

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4. Stricter rules apply to cases governed by Chapter 154, see 28 U. S. C. § 2263(b)(3)(B); *Calderon* v. *Ashmus*, 523 U. S. 740, 750 (1998) (Breyer, J., concurring), but that chapter also provides for a pre-filing stay. See 28 U. S. C. § 2262(a).

commences and jurisdiction attaches when the petition is filed, not when a stay request is made.

Congress did not go out of its way to abrogate *McFarland* because, in all likelihood, it believed that most if not all capital habeas cases would be governed by Chapter 154 within a couple of years. Amending § 2251 to say even more clearly what it already says clearly enough was simply not considered important given the expectation that Chapter 153 stays of execution would shortly vanish from the scene.

Congress similarly tied commencement to the application in the new statutes of limitation. See 28 U. S. C. §§ 2244(d)(1), 2255, 2263(a). All three unambiguously refer to the § 2254 application or § 2255 motion as the filing subject to the limitation, not any pre-application motions. Only by ignoring the clear statutory language could a court come to the contrary conclusion. The Ninth Circuit did not do so in *Kelly*, see *Dennis* v. *Woodford*, 65 F. Supp. 2d 1093, 1094-1095 (ND Cal. 1999), and apparently neither it nor any other court has done so since.[5]

Between Congress's clearly expressed understanding in § 2262, the lack of any compelling necessity for prefiling stays, and the virtues of consistency, the best solution is to simply abandon *McFarland*'s strained interpretation of "pending." A habeas proceeding under § 2254 commences and becomes pending when the petition is filed and not before.

Simply put, *McFarland* could have achieved the practical result needed with a cleaner and simpler approach. Although it is not necessary to modify *McFarland* to hold AEDPA applicable to this case, doing so would simplify one corner of a notoriously complex body of law. The simple solution is that

5. Hertz and Liebman are unable to cite any cases that actually support their characteristically expansive interpretation. See 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 5.2b, p. 268, n. 84 (4th ed. 2001).

a habeas case is commenced upon the filing of the petition, but 21 U. S. C. § 848(q) authorizes precommencement appointment of counsel. A single commencement date, consistent with civil practice, would then govern stays, application of AEDPA, and the statute of limitations in all habeas cases, capital and noncapital.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

November, 2002

Respectfully submitted,

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The following statutes expressly provide for appointment of counsel:

Ariz. Rev. Stat. Ann. §§ 13-4041(B), 13-4234(D) (2000)

Ark. Code Ann. § 16-91-202(a)(1) (Supp. 2001)

Cal. Gov't Code § 68662 (West Supp. 2002)

Colo. Rev. Stat. § 16-12-205 (2002)

Conn. Gen. Stat. § 51-296(a) (Supp. 2002)

Fla. Stat. Ann. § 27.702(1) (1997)

Idaho Crim. Rules 44.2 (2002)

725 Ill. Comp. Stat. Ann. § 5/122-2.1(a)(1) (1993)

Ind. Code Ann. § 33-1-7-2(a) (1995)

Kan. Stat. Ann. § 22-4506 (Supp. 2001)

Ky. Rev. Stat. Ann. § 31.110(2)(c) (Banks-Baldwin 2001)

La. Rev. Stat. Ann. § 15:149.1 (West Supp. 2002)

Md. Crim. Pro. Code Ann. § 7-108 (2001)

Miss. Code. Ann. § 99-39-23(9) (2002)

Mo. Sup. Ct. Rule 29.15(e) (2002)

Mont. Code Ann. § 46-21-201 (2001)

Nev. Rev. Stat. Ann. § 34.820 (2002)

N. H. Rev. Stat. Ann. § 604-A:2 (Supp. 2002)

N. J. Stat. Ann. § 2A:158A-5 (West 2002)

N. M. Stat. Ann. §§ 31-11-6, 31-16-3 (2002)

N. Y. Jud.. Law § 35-b (McKinney 2001)

N. C. Gen. Stat. § 7A-451(a)(2) (2001)

Ohio Rev. Code Ann. §§ 120.16, 120.26 (2001)

Okla. Stat. Ann. Tit. 22, § 1355.6(B) (Supp. 2003)

Or. Rev. Stat. § 138.590 (2001)

Pa. R. Crim. P., Rule 904, Pa. C. S. A. (Purdon 2001)

S. C. Code Ann. § 17-27-160(B) (Supp. 2001)

S. D. Codified Laws § 21-27-4 (1997)

Tenn. Code Ann. § 40-30-207 (1997)

Tex. Crim. P. Code Ann. § 11.071(2)(a) (2002)

Utah Code Ann. § 78-35a-202 (2002)

Va. Code Ann. § 19.2-163.7 (Supp. 2002)

Wash. Rev. Code Ann. § 10.73.150 (2002)

Wyo. Stat. § 7-6-104(c)(ii) (2001)

The following statutes are discretionary on their face, but the attorneys general of the respective states inform us that the practice is to always appoint counsel in capital cases:

Ala. Code § 15-12-23(a) (Supp. 2001)

Del. Superior Ct. Crim. Rule 61(l)(3) (2002)

Neb. Rev. Stat. Ann. § 29-3004 (Supp. 2001)